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No. 78-367

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROGER W. QUIGLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1978. The petition for a writ of certiorari was filed on September 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, retrial of petitioner following the district court's declaration of a mistrial at his request is barred by the Double Jeopardy Clause.

STATEMENT

An indictment returned on June 10, 1977, by a grand jury of the United States District Court for the Western District of Pennsylvania charged petitioner and co-defendant Earl W. Shord with demanding and receiving sums of money from contractors through the wrongful use of fear of financial and economic injury, in violation of 18 U.S.C. 1951 and 2 and 29 U.S.C. 186(b). On October 20, 1977, petitioner's trial on these charges terminated with the declaration of a mistrial. Prior to their retrial, petitioner and Shord moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion (Pet. App. 3a-14a) and the court of appeals affirmed (Pet. App. 1a-2a).

To the extent relevant to the issue raised here, the events prior to the declaration of a mistrial were as follows: During the course of construction of a large building in Pittsburgh, Pennsylvania, co-defendant Shord, the business manager of Local Union 5, International Brotherhood of Electrical Workers, and petitioner, the local's business agent, demanded and received various sums of money from a contractor through fear of economic and financial injury resulting from labor difficulties at the building project.

Pursuant to an agreement with petitioner and Shord, the contractor made the payments to petitioner and to the union's attorney, William Murray, who in turn disbursed the money to Shord in installments (Pet. App. 3a-5a).

Murray was named as an unindicted co-conspirator and testified for the government under immunity. When Murray was asked on direct examination why payments to Shord had ceased on August 20, 1975 (Pet. App. 15a), counsel for petitioner requested a bench conference, indicating that he would like an offer of proof as to the question's relevancy. Government counsel stated that Murray would testify that around that time Shord had been removed from union office and thus was no longer in a position to receive money from the contractor. The prosecutor indicated that Murray would further testify that following Shord's removal from office, Shord had inquired of him, "I guess this means I won't get the other $4,500" (Pet. App. 16a). In response to the concern expressed by defense counsel that any testimony concerning Shord's removal from office would be highly prejudicial because it would imply that the union had made a judgment about Shord's guilt in this matter, the court ruled that it would not admit any testimony as to Murray's knowledge of the union's investigation of Shord or of Shord's resignation, but that it would allow Murray to testify about any statements that Shord himself had made to him (Pet. App. 18a-19a). The prosecutor informed the court that he was not certain precisely what Murray's tes-

timony would be in light of this ruling and requested a recess "[o]ut of an abundance of caution" in order to make that determination (Pet. App. 19a).

Following the recess, government counsel asked a series of questions designed to elicit what Shord had said to Murray immediately prior or subsequent to receiving the last payment (Pet. App. 19a-22a). Murray replied that Shord had told him that he had been removed from office and had stated, "I guess this means that I won't get the remainder of my money" (Pet. App. 23a). The prosecutor then asked Murray:

> Q. Did [Shord] say something to the effect, "They finally got me on this one," or anything of that—
>
> A. He says that, "Finally—

Defense counsel immediately objected and requested a mistrial on the grounds that the government's question was leading and prejudicial. During the ensuing conference held on the mistrial motion, the prosecutor informed the court (Pet. App. 23a-24a) that he had gone over the testimony with Murray very carefully during the recess and was certain that Murray would testify that Shord had made that exact statement to him. The prosecutor explained that he had attempted unsuccessfully to elicit this response from Murray before asking the leading question and that it was his understanding of the court's ruling that he would be allowed to bring out any statements Shord had made to Murray concerning these events (Pet. App.

27a-28a; Tr. 382). The district court concluded that the prejudicial effect of Murray's testimony, which tended to show that Shord had been removed from union office as a result of the very conduct that was the subject of the indictment, could not be cured by cautionary instructions, and it accordingly granted petitioner's and Shord's motion for a mistrial (Tr. 405).

ARGUMENT

1. Petitioner contends (Pet. 16-35) that, in light of the district court's warning to the prosecutor that any testimony by Murray concerning the union's prior investigation of Shord's involvement in this matter would be prejudicial, the government's subsequent questioning of Murray amounted to "prosecutorial overreaching" and that a retrial is therefore prohibited by the Double Jeopardy Clause. Petitioner concedes, however (Pet. 19), as he must, that unlike the situation in which the court orders a mistrial over the defendant's objection, in which event a retrial would be prohibited unless the mistrial declaration was warranted by "manifest necessity," when the mistrial has been declared at the defendant's request the bar to a retrial is generally removed. *United States* v. *Scott*, No. 76-1382 (June 14, 1978), slip op. 10-11; *Lee* v. *United States*, 432 U.S. 23 (1977); *United States* v. *Dinitz*, 424 U.S. 600 (1976). As this Court explained in *Dinitz* (424 U.S. at 608):

> The distinction between mistrials declared by the court *sua sponte* and mistrials granted at the defendant's request or with his consent is

> wholly consistent with the protections of the Double Jeopardy Clause. Even when judicial or prosecutorial error prejudices a defendant's prospects of securing an acquittal, he may nonetheless desire "to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States* v. *Jorn* [400 U.S. 470, 484 (1970)]. Our prior decisions recognize the defendant's right to pursue this course in the absence of circumstances of manifest necessity requiring a *sua sponte* judicial declaration of mistrial. But it is evident that when judicial or prosecutorial error seriously prejudices a defendant, he may have little interest in completing the trial and obtaining a verdict from the first jury. The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions.

At the same time, the Court has suggested that a second trial may be barred by the Double Jeopardy Clause even after a mistrial declared at a defendant's request, in the event of deliberate prosecutorial misconduct calculated to provoke a mistrial motion and thereby to subject the defendant to a successive prosecution in which the government might have a more favorable opportunity to obtain a conviction. See

United States v. *Dinitz*, *supra*, 424 U.S. at 611; *United States* v. *Jorn*, 400 U.S. 470, 485 n.12 (1970).

Thus, where a prosecutor has introduced into evidence "a known false exhibit" (*United States* v. *Kessler*, 530 F.2d 1246, 1257 and n.21 (5th Cir. 1976)), read to the jury irrelevant and highly prejudicial portions of the defendant's grand jury testimony despite prior assurances to the district court that such material had been excised (*United States* v. *Martin*, 561 F.2d 135 (8th Cir. 1977), or breached a specific agreement not to present certain evidence (*United States* v. *Broderick*, 425 F. Supp. 93 (S.D. Fla. 1977)), the courts have held that such deliberate misconduct amounted to prosecutorial overreaching and that a second prosecution was prohibited following the declaration of a mistrial at the defendant's behest.[1] On the other hand, the courts have concluded that errors by the prosecutor do not constitute overreaching, and hence do not prevent a retrial following the declaration of a mistrial, in the absence of evidence of an "evil motive" on the part of the government. See *Moroyoqui* v. *United States*, 570 F.2d 862, 864 (9th Cir. 1977), cert. denied, No. 77-1375 (April 24, 1978); *United States* v. *Crouch*, 566 F.2d 1311, 1316-1321 (5th Cir. 1978); *United States* v. *Buzzard*, 540 F.2d 1383, 1387 (10th Cir. 1976), cert. denied,

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[1] We have serious reservations about the correctness of these decisions under the circumstances presented in the particular cases. Since, however, as discussed below, petitioner would not have prevailed even in the Fifth or Eighth Circuits, this case presents no occasion for examination of the propriety of the results in *Kessler* and *Martin*.

429 U.S. 1072 (1977); *United States* v. *Wilson*, 534 F.2d 76 (6th Cir. 1976). In sum, "[i]n order to elevate * * * a typical order [declaring a mistrial] into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, * * * but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial." *Divans* v. *California*, 434 U.S. 1303 (1977) (Rehnquist, Circuit Justice).[2]

Petitioner has made no such showing here of intentional prosecutorial misconduct designed to force a mistrial. To begin with, any "overreaching" by the government concerned Shord alone and could not have prejudiced petitioner. Moreover, in asking Murray the leading question found to be objectionable, the prosecutor believed in good faith that he was complying with the court's earlier ruling that anything Shord had said to Murray would be admissible. As the district court pointed out in denying petitioner's motion to dismiss the indictment (Pet. App. 13a-14a):

> [I]t is apparent that the government here has not been guilty of prosecutorial overreaching or bad faith or the purpose of deliberately prejudicing the defendants or provoking them into making a motion for mistrial so that the government could try again another day to convict them in a case that was going badly. As a matter of fact, the evidence already produced by the government showed a course of conduct which would have justified a conviction.
>
> Rather, the court appraises the situation which resulted here as a case of inadvertence by the prosecutor coupled perhaps with some confusion as to exactly what the court's ruling prior to lunch had indicated as permissible and the resulting conference between government's counsel and the witness, an attorney, had left him in doubt as to how far he could go. For this reason he was hesitant to respond to the government's questions and this in turn led to the leading questions which should not have been asked and which brought out the very thing which the court had ruled was improper except as admissions and statements from the defendant, to wit: a showing that the international union had removed this official for this very conduct which was being considered by the court and jury in this case.

[2] We have discussed this matter at greater length in our brief in opposition to the petition for a writ of certiorari in *McFadyen-Snider* v. *United States*, cert. denied, No. 77-1117 (April 24, 1978), a copy of which we are providing to petitioner.

This factual finding, affirmed by the court of appeals, does not warrant further review.

2. Petitioner alleges further (Pet. 39-41) that the standard used by the district court for determining whether the prosecutorial error was of the sort that bars a retrial conflicts with that announced by the Fifth and Eighth Circuits in *United States* v. *Kessler*, *supra*, and *United States* v. *Martin*, *supra*. According to petitioner (Pet. 39), the courts below "would grant relief pursuant to the Double Jeopardy Clause of the Fifth Amendment only upon a showing

that the prosecutor, in causing the mistrial, acted in bad faith or that his conduct was willful and intentional," whereas the Fifth and Eighth Circuits do not require a finding of "intentional misconduct."

An examination of the cases on which petitioner relies reveals that there is no conflict. As noted above, *United States* v. *Martin*, *supra*, involved the prosecutor's reading to the jury the transcript of the defendant's grand jury testimony, which contained irrelevant and highly prejudicial remarks made by grand jurors, after assuring the court that the irrelevant statements had been excised. The district court, at the defendant's request, declared a mistrial. In considering defendant's claim that his retrial was barred by the Double Jeopardy Clause, the court of appeals remarked (561 F.2d at 139), "[a]lthough mere negligence by the prosecutor is not the type of overreaching contemplated by *Dinitz*, if the prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found." It then found that the government's actions amounted to "more than mere prosecutorial negligence" and could "best be described as prosecutorial error undertaken to harass or prejudice the defendant—prosecutorial overreaching." The Eighth Circuit has been even more explicit in a later case, *United States* v. *Weaver*, 565 F.2d 129, 133 (1977), cert. denied, 434 U.S. 1074 (1978), holding that "[o]nly in limited circumstances, where the judicial or prosecutorial error that prompts the defendant's [mistrial] motion is intended to provoke

the motion or is otherwise motivated by bad faith or undertaken to harass or prejudice the defendant, does the double jeopardy clause bar retrial." See also *United States* v. *King*, No. 78-1286 (8th Cir. Oct. 5, 1978), slip op. 5-6.

The Fifth Circuit has taken the same approach. In *United States* v. *Kessler*, *supra*, the prosecution, in addition to soliciting inadmissible hearsay declarations from a witness, introduced into evidence an automatic rifle that it knew to be a false exhibit. The court of appeals held that, despite defendants' having moved for a mistrial, they could not be retried consistent with the Double Jeopardy Clause. The court stated that "[t]o find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction' " (530 F.2d at 1256; footnote omitted), and found that the government was guilty of intentional misconduct in introducing the rifle (*id.* at 1257). In a subsequent case, *United States* v. *Crouch*, *supra*, the Fifth Circuit restated the test to be used in such cases: "[T]he defendants may be retried unless the mistrial motion was prompted by error 'motivated by bad faith or undertaken to harass or prejudice' " (566 F.2d at 1317, quoting from *United States* v. *Dinitz*, *supra*, 424 U.S. at 600).

Thus, since the prosecutor's conduct in this case did not rise to the level of "gross negligence or inten-

tional misconduct" designed to precipitate a mistrial, petitioner's retrial would not be barred in any circuit.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner also asserts (Br. 36-39) that he was not exercising a free choice when he joined in co-defendant Shord's motion for a mistrial, since if he had failed to join in the motion he would have waived the issue in the event that the motion was denied. This contention is specious, since petitioner could have noted his objection while insisting on his "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). Petitioner's position was no different than if he had stood trial alone and been confronted with the choice of either moving for a mistrial or proceeding with the trial and facing the prospect of a probable conviction followed by an appeal, a reversal of the conviction and a later retrial. See *United States* v. *Dinitz*, *supra*, 424 U.S. at 609.

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